88-1413

Supreme Court, U.S.
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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

****

WILLIAM A. FITZGERALD, PETITIONER

V.

DON M. NEWMAN, ACTING
SECRETARY, U.S. DEPARTMENT
OF HEALTH AND HUMAN SERVICES

****

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

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QUESTION PRESENTED

DID THE COURTS BELOW, IN GRANTING SUMMARY JUDGEMENT TO THE DEFENDANT, ADEQUATELY PROTECT THE PETITIONER'S RIGHTS IN THE FEDERAL EMPLOYMENT RACIAL DISCRIMINATION AREA WHEN THEY FAILED TO ADHERE TO U.S. SUPREME COURT STANDARDS AND ALSO FAILED TO INVESTIGATE A TIMELY WARNING THAT IRREGULARITIES IN THE LEGAL SYSTEM MIGHT HAVE ADVERSE IMPACT UPON THE PETITIONER'S CASE?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table Of Authorities	iv
Opinions Below	v
Jurisdiction	vi
Statutes Involved	vi
Statement of Case	1
Argument	
Irregularities in the Legal System	12
Dr. Kohn - A Self-Impeached Witness	18
The Courts Below Ignored RIF Regulations and Inadvertently Aided the Government's Position	23
District Court Was Misinformed	28
District Court Admitted That A Material Fact in Dispute Did Exist	29
By Not Holding The Mandatory Oral Argument, The District Court Failed To comply With Supreme Court Rulings	30

TABLE OF CONTENTS (Continued)

	Page
An Unrebutted *prima facie* Case Is A Material Fact In Dispute	31
Reasons For Granting This Petition	32
Conclusion	35
Proof of Service	37
Appendices A-J	

TABLE OF AUTHORITIES

	Page
Carey v. United States Postal Service, 812 F.2d 621 (1st Cir. 1987)	27
Dea v. Cook, 810 F.2d 857 (5th Cir. 1986)	27
Grimsby v. Reynolds Metal Co., 821 F.2d 590 (11the Cir. 1987)	27
Hales v. First Appalachin Corp., 494 F. Supp. 330 (N.D. Ala. 1980)	18
Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985), modified, 784 F.2d 1407 (9th Cir. 1986)	25, 28
McDonnell Douglas Corp v. Green. 411 U.S. 792 (1972)	13, 15, 17 20, 30, 31, 35
Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985)	15
Texas Dept. Of Community Affairs v. Burdine, 450 U.S. 248 (1981)	16
Williams v. Edward Appffels Coffee Co., 792 F.2d 1482, 1486 (9th Cir. 1986)	28

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, William A. FitzGerald, respectfully prays that a writ of certiorari be issued to review the judgement of the United States Court of Appeals for the Fourth Circuit entered on October 6, 1988.

OPINIONS BELOW

The decision by the Court of Appeals is unpublished. A copy of the opinion, FitzGerald v. Secretary, U.S. Department of Health and Human Services, No. 88-2518 (4th Cir., October 6, 1988) is attached as Appendix A, infra. A request for a rehearing was timely filed. It was denied on November 17, 1988 and is attached as Appendix B, infra. The Judgement, Order and Memorandum handed down in FitzGerald v. Secretary, U.S. Department of Health and Human Services, No. S-86-2819 (D. Md., February 12,

1988) (Judge Smalkin) appears as Appendix C, infra. The decision of the Equal Employment Opportunity Commission, FitzGerald v. Department of Health and Human Services; dated September 29, 1987 (Dolores L. Rozzi, Director, Office of Review and Appeals); Appeal No. 01862296; Agency No. ADM378-84, is attached as Appendix D, infra.

JURISDICTION

The jurisdiction of this court is invoked under the authority of Title 28, United States Code, Section 1254(1) (1988) in conjunction with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. Sec. 2000e-16. Employment by Federal Government.

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. Sec. 2000(e)-16 p. 918 Employment by Federal Government:

(a) All personnel actions affecting employees or applicants for employment...in executive agencies...and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Rule 56(c) Federal Rules of Civil Procedure:

[S]ummary judgement shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any materal fact and that the moving party is entitled to judgement as a matter of law.

STATEMENT OF THE CASE

The petitioner, Dr. William A. FitzGerald, is a black sociologist employed at the National Institute on Drug Abuse (NIDA). He brought action in the United States District Court for the District of Maryland in which he alleged employment discrimination on the basis of race, and reprisal for filing an employment discrimination charge under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. Sec.2000e-16 p. 918 Employment by Federal Government.

The complaint alleged that the Defendant, Secretary of the Department of Health and Human Services, discriminated against petitioner on the basis of race as follows: (1) attempting to deny him the right to apply for a research position for which he was qualified; (2) wrongfully attempting to keep him from "bumping" another employee during the 1981 Government-wide reduction-in-force (RIF);

(3) preventing him from performing his scheduled duties and receiving the experience that he would have gained as a researcher on the "Polish Study," (4) inaccurately and illegally appraising his work performance; and (5) denying him the opportunity for promotion. The complaint further alleged that as a result of his filing a race charge alleging discrimination and reprisal in April, 1984, he was subjected to retaliatory treatment in the form of illegal evaluations, harassment and a pattern of being given "make work."

In support of these claims, the petitioner presented to the District Court documentary evidence which established the following: He became a Program Analyst in the Office of Program Development and Analysis in NIDA, a part of the Alcohol, Drug Abuse and Mental Health Administration (ADAMHA), in the Department of Health and Human Services (DHHS) in March 1980. During his first year with NIDA, petitioner was considered a very fast learner

and was recommended for promotion from GS-12 to GS-13.

Pursuant to the December 12, 1981 RIF, petitioner was notified by the Agency that a higher ranked female was entitled to his position. In response, petitioner identified a Research Sociologist, GS-184-12 position he was qualified to perform in the Laboratory of Socio-environmental Studies (LSES) in the Intramural Research Program (IRP) of the National Institute of Mental Health (NIMH). The encumbent of this position was Dr. Joanne Miller, a white female, who was a temporary employee, and therefore could be bumped.

Upon petitioner's applying for Dr. Miller's position, Ms. Nordstrom, Director of ADAMHA Personnel, denied him the position in writing, claiming he was not qualified. The basis of her assertion was that the position required experience in computer technology, <u>including computer programming.</u> Petitioner discovered that computer programming was not a

requirement for the job nor was this barrier erected for whites who applied for the position.

Further, Mrs. Nordstrom also stated in writing that Dr. Miller was a career conditional employee instead of a Group III temporary employee who would have been much easier to bump. Petitioner discovered that this assertion about Dr. Miller's employment record was equally false.

Even after Petitioner brought these considerations to Ms. Nordstrom's attention, she continued to claim otherwise. Only when petitioner raised the issue of racial discrimination and took his case to investigative reporters at WJLA-TV, Channel 7, did Ms. Nordstrom suddenly re-evaluate his credentials, find him highly qualified, and offer him the position to which he was legally entitled.

Upon his arrival at the LSES, officials there subjected Petitioner to severe harassment

designed to force him to leave the job. Dr. Kohn, the Lab Chief, told petitioner that he was unqualified for the position and threatened him with low performance ratings which he promised would destroy his career. He advised petitioner to depart the Lab before he was forced to undergo testing, i.e., being put on the job, allowed to fail, and then being fired. (See Kohn's deposition at 72)

Standing his ground, petitioner refused to voluntarily relinquish his position. Hence, Dr. Miller, the white sociologist holding the job in question was supposedly "bumped" and slated for separation from the Federal Service.

Dr. Kohn, in turn, wrote a scathing memorandum to Ms. Nordstrom which denounced petitioner as being unfit to serve as even a journeyman researcher despite his obvious credentials. Dr. Kohn even had the audacity to assert that only four or five people in the entire world were capable of handling the complexities of the Polish Study. This remark

is very significant. Petitioner is, after all, the only black civil service scientist ever employed in the LSES.

High ranking ADAMHA officials held a closed meeting with Dr. Kohn on January 5, 1982. Present were Ms. Nordstrom, her superior, Mr. Joseph Leone, the third highest ranking person at ADAMHA, and Mrs. Hazel Rea, representing Dr. Frederick Goodwin who was awaiting official appointment as Director of the IRP. While petitioner was never informed of the secret deliberations conducted therein, the meeting resulted in the creation of a new position at LSES; secret removal of petitioner from the position assigned to him in the RIF, (despite prohibition under RIF rule, 351.603, op. cit., against removing him before the end of three months), and his transfer to this new position. It was petitioner's erroneous understanding that he was still in the same position as before but in a new slot which had been recently vacated by a retiree.

On January 15, 1982, Dr. Kohn informed petitioner that Dr. Miller's termination notice had been cancelled. She, instead, would be his supervisor and would provide him training on the Polish Study. He later was eased off the Polish Study altogether.

Petitioner, however, never agreed to accept a position as a trainee (See appellant's Informal Brief to the Court of Appeals, Fourth Circuit, Attachment 12). He, instead, repeatedly asked to begin his legally assigned job. Dr. Miller's resignation four months later left an opening on the Polish Study which petitioner still was not permitted to fill. The petitioner remained without job or assignment for 22 months.

As Dr. Kohn never made any attempt to charge petitioner formally with incompetence or to remove him legally under RIF regulations designed for that purpose, it was obvious that Dr. Kohn was afraid to test petitioner's competence. In fact, although Dr. Kohn was

petitioner's direct supervisor, he never tested him or did any work at all with him during his entire stay in the Lab. Petitioner's term appointment expired on February 23, 1984, and he was reassigned to NIDA. Petitioner then filed a formal complaint of racial discrimination and retaliation against ADAMHA. In March of 1984, the agency accepted the complaint for investigation.

During this same period, petitioner noticed that he was being treated differently at NIDA than before the RIF. Prior to his assignment at LSES and his filing of his complaint, he had been well-regarded by his peers and even recommended for a promotion. He suddenly was faced again with unlawful performance appraisals, "make-work," harassment and insults. Ms. Becker, petitioner's immediate supervisor, began to withhold information which had a vital bearing on how well he performed his job. She also gave other members of the staff disproportionate amounts

of work while claiming there was a lack of work for petitioner. Other members of the staff generally ignored petitioner, knowing he was a marked man. However, once, within petitioner's hearing, Ms Becker intimated to others that an unnamed member of her office staff was "less than dirt and was merely being tolerated." Petitioner eventually traveled to the HHS building and complained about this treatment directly to officials at the Secretary's Office, the Inspector General's Office, and at the Assistant Secretary For Health's Office under the alleged DHHS Open Door Policy. This created consternation at NIDA and the harassment became more subtle.

Despite all of the above, DHHS ruled that petitioner had not been discriminated against because of race/color. Petitioner appealed this decision to the EEOC on June 17, 1986 and then, at the appropriate time, filed in Federal District Court in Baltimore. The EEOC took over 15 months to respond but on September 29,

1987, it found that ADAMHA was not in compliance with Title VII and EEO regulations (29 C.F.R. Sections 1613.212, .214, and 29 C.F.R. Section 1613.216). Thus the Agency's no discrimination decision was vacated and the case remanded for investigation under the appropriate regulations. ADAMHA also was forced to reinstate the reprisal/retaliation part of petitioner's complaint which it had removed without cause or explanation.

About four months later, the defendant moved in District Court for summary judgement sans oral argument. Before the court could make a judgement, however, petitioner acrimoniously discharged his lead attorney due to evidence which seemed to indicate that his counsel was deliberately and systematically undermining his case. Petitioner immediately notified Judge Smalkin of this fact by certified letter with attachments. In the first attachment to this letter, which is petitioner's letter to his counsel terminating

counsel's services, petitioner stated:

> It is clear to me what is going on. It is my personal opinion that you've been trying to scuttle this case for a long time. That's why I decided to bring in someone else to handle the last two depositions.

The Court, however, brushed aside any investigation of these charges and pushed through a summary judgement ruling in favor of the government, despite the obvious consequences to the unprotected rights of the petitioner. The petitioner, having become financially depleted because of his lawyer, filed a pro se appeal in the U.S. Court of Appeals For the Fourth Circuit. The District Court decision was upheld by the Appellate Court and a request for a rehearing was denied.

IRREGULARITIES IN THE LEGAL SYSTEM

Subsequent to filing a response to Defendant's Request For Summary Judgement, petitioner was forced to discharge his counsel because of his very strange behavior and a feeling on the part of the petitioner that counsel was attempting to undermine his case. For example, counsel allowed petitioner to be deposed without preparation of any kind while advising him to waive reading and signing his deposition (See FitzGerald deposition at 257).

Another questionable act by this same attorney included his apparent efforts to distort or omit evidence in his briefs that was favorable to petitioner. For example, counsel always asked Petitioner to try his hand at writing the first draft of every brief. The purpose, obviously, was to find out how much petitioner knew about the law and where he would be most vulnerable. In one instance, petitioner included a vitally important

memorandum by Mrs. Hazel Rea which was laden with the kind of demonstrable deception and falsehoods that was practiced by high officials in this case. Counsel prompted excised it from the brief. (See appellant's Informal Brief to the U.S. Circuit Court of Appeals for the Fourth Circuit at 9-10 to understand how vital this memorandum is to petitioner's case). Counsel also insisted upon inserting into the brief the highly questionable claim that petitioner was more qualified than Dr. Miller despite a warning from petitioner that such statements would make the brief seem frivolous and easy to discredit. Counsel seemed determinined to make the McDonnell Douglas four-step discrimination proof scheme central to the case even though two of the four elements obviously did not fit. Counsel also concealed vital information from the petitioner until it was too late to win a point of law (see Apprendix F); arbitrarily dismissed petitioner's case before the EEOC (see letter

bearing on this, Appendix G); and possibly was implicated in altering testimonial transcripts and/or erasing audiotapes made of Dr. Kohn's testimony by co-counsel who had been called in because of petitioner's distrust of his lead counsel.

Let us assume for the sake of discussion that the government, very apprehensive over the possibility of losing a case which might have far-reaching ramifications for its "lily white" scientific research, sought an ally in the petitioner's camp to sabotage his chances. (This is not as far-fetched as it may seem since the petitioner turned over to the EEOC documentary evidence indicating that EEO offices up and down the line acted in concert to impede petitioner's EEO case (See Appendix H)). Consider further that the government's main witness, a Dr. X, had been skillfully maneuvered into damaging admissions during his deposition by a new co-counsel who had been specifically hired for this purpose. The

co-counsel also had audiotaped Dr. X's testimony at the request of petitioner. Obviously, the government would then have to prevent those tapes from falling into the hands of the petitioner. To do this, three people had to cooperate: petitioner's lead counsel; the co-counsel with the tapes; and the reporter who recorded the testimony. Whether petitioner knew the transcripts had been altered was of no consequence unless he had the proof. No one seems to know what actually happened but the fact remains that the petitioner was well aware that Dr. Kohn's transcripts differed from the testimony he had heard and that the four audiotapes "accidentally" had been erased.

In order to assure victory, the government would have had to follow two other strategies: (1) submit a faulty petitioner's brief to the District Court and (2) deplete his financial resources so he could not possibly appeal a losing decision. Whether or not this happened is unclear but petitioner's brief obviously was

strangely incompetent and his counsel did drain away the last of his $20,000 in life savings even before charging petitioner $5,000 for the 25-page brief as well as reinstating an already cancelled $500 bill from the court reporter. (See letter relating to the former in Appendix I and letters relating to the latter in Appendix J). In desperation, Petitioner dismissed his lead counsel and sent a copy of the dismissal letter to Judge Smalkin together with a request for badly needed advice (see appendix E).

In regard to the loyalty of the petitioner's lead counsel, nothing could be more inimical to trust than unaccountable acts of omission on his part. Any attorney just out of law school knows that to permit the defendant's affidavits to go uncontested is a sure way to lose upon a summary judgement. (See 28 U.S.C.A. Federal Rules of Civil Procedure. Rule 56, note 683). Petitioner's counsel did exactly that with respect to the Becker retaliation complaint declaration. Even

more indicative of questionable loyalty is the failure of counsel to introduce into the case the retaliation/reprisal charges the EEOC had recently restored against ADAMHA and the LSES. Even under-schooled attorneys know that retaliation/reprisal charges are infinitely easier to win where -- as in this case -- the three elements required by the McDonnell Douglas proof scheme were already in place. Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985), citing McDonnell Douglas Corp v. Green, 411 U.S. 792 (1972).

DR KOHN -- A SELF-IMPEACHED WITNESS

Rule 56(c) of the Federal Rules of Civil Procedure states:

> [Summary judgement] shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law.

Title VII imposes upon Rule 56 a further condition. Plaintiff must present a prima facie case and once presented, the burden shifts to the defendant to successfully rebut it through the introduction of admissible evidence. The answers provided must be legally sufficient to justify judgement for defendant. Texas Dept. of Community Affairs v Burdine. 450 U.S. 248, (1981).

The District Court ruled in the instant case that:

> Defendant has offered legitimate, non-discriminitory reasons for the action relating to the RIF, and the plaintiff has submitted no evidence whatsoever that the proffered reasons are merely a pretext for racial discrimination. Appendix C, at 12.

The Court erred in awarding summary judgement to the defendant for several reasons.

The District Court in its decision as set forth in its memorandum never ruled that petitioner had failed to present a prima facie case, thus acknowledging by implication that he had.

The Court, at page 12 of it's memorandum, gave enormous weight to Dr. Melvin Kohn's virtually uncorrobrated opinion that petitioner was not qualified to do Dr. Miller's job. Dr. Kohn says in pertinent part:

> Let me tell you why I was so certain he couldn't possibly do it. We are dealing with very advanced statistical techniques. Joanne Miller had gone to graduate school at the department of sociology in the country that is most reknowned [sic] for training people in quantitiative data analysis. She had come to our laboratory and had a five year post doctoral fellowship and had a great deal of training and [a] huge amount of experience...
>
> Fitz had gone to a graduate school which does not pride itself on training people in quantitative data analysis. It is simply not its forte...
>
> He wasn't prepared to start to do the kinds of things that Joanne did because he didn't have in his background the kinds of things that Joanne had had in graduate

> school no less the five years post doctoral...And when he said I can do this in three months, all it meant was he didn't know what the this was. He couldn't possibly do it...He did not have the training or experience.

(Kohn Deposition Transcript at 57-58).

The first thing petitioner's lawyer should have done was to impeach Dr. Kohn as a witness using available evidence. For example, Kohn's statement above fails to rebut because it was subjective and the U.S. Supreme Court ruled that subjective criteria carried little weight in rebutting charges of discrimination. See McDonnell Douglas, 411 U.S. at 798.

Dr. Kohn also was given to making incredible statements. In Attachment 4 to plaintiff's Opposition to Summary Judgement, Dr. Kohn's memorandum to ADAMHA personnel declaring that only five people in the world could perform Dr. Miller's job is included. Dr. Kohn would find little support for such an incredible statement. Incredible evidence, it

was ruled in Hales v. First Appalachian Corp., 494 F. Supp. 330 (N.D. Ala.1980), may be disregarded by the courts. Dr. Kohn also has a history of inconsistencies or exaggerations. In his deposition (Kohn at 72), he admitted he advised petitioner that someone in personnel had told him to put petitioner on the job, let him fail and then fire him. When confronted, he was unable to name the person. Kohn wrote on petitioner's first performance plan "Dr. FitzGerald has begun to do statistical analyses in conjunction with Dr. Miller and me (see Defendant's Motion for Summary Judgement, Attachment Q)," but later, in his deposition at 224-5, he admitted that he had never worked with petitioner. Most indicative of Dr. Kohn's propensity toward exaggeration is his appraisal of petitioner's term paper which he characterized as "Appalling...incredibly amaturish, not even a good undergraduate term paper." (See Petitioner's Informal Brief to the Appeals Court, Attachment 33). This same paper

was judged by a former, more prestigious, member of Kohn's LSES staff as, "Nice job." Id, Attachment 34.

Except for Dr. Miller, who was the only person in the LSES with whom petitioner ever worked, and against whom she held a burning resentment for having taken her job, Dr. Kohn's testimony was totally uncorroborated. Even Dr. Miller shied away from the incredible statements Dr. Kohn was making. On the other hand, petitioner was supported on the qualifications issue by Mrs. Pauline Nordstrom and by a whole ADAMHA RIF Review committee which judged him qualified. (See Nordstrom deposition at 14).

Finally, neither Dr. Kohn nor Dr. Miller knew the LISREL program before coming into the laboratory. They learned the program while in the lab by being instructed in it by a gentleman from the University of Michigan who was hired to teach them (See plaintiff's deposition at 100).

THE COURTS BELOW IGNORED RIF REGULATIONS AND INADVERTENTLY AIDED THE GOVERNMENT'S POSITION

Under RIF regulation, 5 CFR Section 351.702, petitioner needed to be only minimally qualified to be eligible for Dr. Miller's job. Making invidious comparisons and measuring him against Dr. Miller has no bearing on the case. Further, under RIF regulation, 5 CFR Section 351.603 (see Kohn deposition at 128), petitioner was entitled to perform Dr. Miller's job for 90 days to demonstrate competence. If he failed to display minimum competence 90 days after starting the job, he was susceptible to being legally removed. Interestingly, Dr. Kohn stated in the notes he took at a high level management meeting called by Mrs. Nordstrom on January 5, 1982 to determine petitioner's fate, that petitioner was characterized as a litigious person of whom one should beware. (See Kohn, supra, at 139.) If this is a true account, would these officials have violated so many Federal regulations for over two years

with the Sword of Damocles hanging over them or would they have rid themselves legally of this menace in a mere 90 days? (See Kohn's deposition at 138-9). Even if the law, as most people hold, is unamenable to logic, a series of facts can be so cogent that they force acceptance. Dr. Kohn insists that he did not put petitioner to the test because he wanted to protect petitioner from himself. Incompetency does not work this way. An incompetent employee is afraid to be tested, especially when he can survive on the job simply by remaining silent. Petitioner continually demanded to be tested, as was his right under the law (see Kohn deposition at 57; 75; 131). The only logical conclusion one can draw is that Dr. Kohn et al were fairly certain that petitioner could perform and were dead set against giving him that chance.

One of petitioner's central agruments was that sub-agency units are barred by RIF regulations from using the qualification issue

as a defense. (Plaintiff's brief at 20.) These regulations spell out that ADAMHA Personnel alone had the authority of job placement. 46 C.F.R. Sec. 351.603 (1981) Had the court and the government not ignored this argument, the government's case would have collapsed. For example, an admission would have strengthened petitioner's prima facie case; a denial would have established a material fact in dispute.

Likewise petitioner in his brief (plaintiff at 19-21) mounted a charge of pretext which was ignored by the court and defendant. The government had argued that it removed petitioner from the Polish Study because of its fear that his incompetency would delay the project (See Kohn deposition at 127). This, of course, was mere pretext masking discrimination because the government could have placed both Dr. Miller and petitioner on the project simultaneously (but operating independently) during the 90-day grace period given to new RIF incumbents. This

would have displayed petitioner's individual capacity and also would have prevented project delay (Plaintiff's brief at 20). Once again both the District Court and the government ignored this central allegation. To have addressed it would have established a material fact in dispute.

For reasons unknown, both the Court and the government remained silent on a series of allegations by petitioner that Federal RIF and other regulations had been violated (See plaintiff's brief at 19-21; Attachmnent 21; Attachment 1; and appellant's Informal Brief at 2; 8-9). Material facts in dispute would have emerged from each one.

The District Court was particularly inattentive in citing parts of Petitioner's case out of context which, of course, changed the meaning considerably. A major example is footnote 2 at 3 which says: "As it turned out, computer programming was not a requirement of the job, but familiarity with the computer

language LISREL was required. The relevance of this fact will be discussed post." The footnote refers to a statement in the text of the Court's Memorandum which says: "By letter dated December 1, 1981, Ms. Nordstrum, Director of ADAMHA Personnel, indicated to plaintiff that he was qualified for a Research Sociologist position, GS-12, but that the position for which he applied required knowledge of computer technology at a level greater than his records indicated that plaintiff had." Unrevealed here is the fact that Mrs. Nordstrom specifically demanded of petitioner evidence of training in computer programming which was not demanded of white applicants. Also not mentioned is that RIF regulations granted petitioner 90 days to display minimum proficiency in LISREL after being placed on the Polish Study. Since petitioner never was allowed to perform his assigned duties, he, in theory, still has 90 days to learn LISREL.

Similarly, the Court stated at 4:

> Dr. Kohn then allegedly said that someone in personnel had told him to put plaintiff in the job, let him fail, and fire him. Plaintiff replied that, if given the chance to fail, plaintiff would in fact succeed, not fail.

The above is not a factual account of what really transpired. In reality, petitioner responded to Dr. Kohn's threat in this manner:

> [That's] another good idea because when you give me the chance to fail, you also give me the chance to succeed and I welcome that opportunity. (See plaintiff's deposition at 108 and Dr. Kohn's deposition at 75).

DISTRICT COURT WAS MISINFORMED ABOUT CASE

That the District Court was woefully misinformed about vital aspects of the law governing petitioner's case is a fact that accrued to the government's advantage. The court should have known that the following were totally untrue but stated them anyway:

> (i) In May 1986, the EEOC, in a final decision found no racial discrimination (Memorandum at 8; rebutted by Appendix D; (ii) knowledge of LISREL was needed by petitioner for him to begin his assigned duties and his lack of this skill was sufficient reason to prevent him from starting his job (memorandum at 14;

rebutted by 5 CFR Sec 351.702. Also see plaintiff's deposition at 98). (iii) plaintiff's performance appraisals were "completely justified" (Memorandum at 14; rebutted by appellant's Informal Brief at 8-9 and plaintiff's Brief at 22-3); (iv) Ms. Becker's declaration was admissible evidence (memorandum, footnote at 17; rebutted by 28 U.S.C. Sec. 1746, such a declaration requires a date); (v) plaintiff had not taken the prerquisites for the LISREL course (Memorandum at 6; rebutted by plaintiff's deposition at 82), and (vi) various facially untrue implications that space does not permit petitioner to pursue such as the court permitting defendant to avoid adhering to RIF placement standards required by law while uniformly adhering to them when dealing with white employees.

DISTRICT COURT ADMITTED THAT A MATERIAL FACT IN DISPUTE DID EXIST

The District Court, on page 7 of its memorandum, stated as follows:

> Plaintiff requested to be allowed to work on the Polish Study, but Dr. Kohn and Dr. Miller suggested that plaintiff begin his laboratory training on a project that was just beginning so that he could learn the appropriate statistical techniques.
>
> Dr. Kohn and Dr. Miller considered the Polish Study to be too far along to be of much help in training plaintiff. Plaintiff disputes that his position was to be that of a trainee.

Quite obviously, the above material fact

is in dispute as the Court, itself, admits and this is highly significant. Dr. Kohn contends that petitioner agreed to be a trainee and it was because of this alleged acceptance on his part that Dr. Kohn consigned him to the role of trainee and moved him off the Polish Study. Dr. Kohn, however, could offer no evidence in support of his contention. Pettioner, on the other hand, has produced irrefutable documentary evidence showing that he rejected trainee status and wanted to perform his legally assigned job on the Polish Study consistent with his RIF mandate. (See apellant's Informal Brief, Attachment 12).

BY NOT HOLDING THE MANDATORY ORAL ARGUMENT, THE DISTRICT COURT FAILED TO COMPLY WITH SUPREME COURT RULINGS

In McDonnell Douglas Corp v. Green, 411 U.S. 793 (1973), the Supreme Court set out a three-step sequence for establishing "the proper order and nature of proof in actions under Title VII of the Civil Rights Act of

1964," as amended. First the petitioner must establish a prima facie case. Second, the respondent must offer legitimate, nondiscriminatory reasons for his actions against petitioner and, Third, petitioner must be given "a full and fair opportunity to demonstrate by competent evidence that the presumptive valid reasons for his rejection were, in fact, a coverup for a racially discriminatory decision." (Supra at 804-805).

The Court ruled that sequencing was of vital importance. The same applies in petitioner's case. After petitioner established a prima facie case at the District Court level, respondent had to rebut it. Once, however, the petitioner learned the respondent's purported reasons for his action, he then had to have been given an opportunity to show that these reasons were mere pretext for unlawful discrimination. Obviously, petitioner could not speculate or guess as to the nature of these reasons until after they

were fully presented. Sequencing thus engrafted upon Rule 56 and Local Rule 6, D.Md as cited at 2 in District Court's Memorandum, the necessity of holding oral argument so that petitioner might engage in showing pretext by the respondent. The District Court, therefore, was in error in failing to hold oral argument.

AN UNREBUTTED PRIMA FACE CASE IS A MATERIAL FACT IN DISPUTE

Defendant, by allowing so much evidence to go uncontested hardly could be said to have rebutted petitioner's prima facie case. Thus petitioner's unrebutted prima facie case was, in itself, a material fact in dispute and defendant was not entitled to summary judgement as a matter of law. In Lowe v. City of Monrovia, 775 F. 2nd 998 (9th Cir. 1985). modified, 784 F.2d 1407 (9the Cir. 1986), the Ninth Circuit stated that it is inappropriate to award summary judgement if a plaintiff has established a prima facie case:

[W]hen a plaintiff has established a prima

facie inference of disparate treatment or circumstantial evidence of discriminatory intent, he will necessarily have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision.

REASONS FOR GRANTING THIS PETITION

Petitioner's case is unique. There exists no precedent or court decision in the literature relating to a black U.S. civil servant who was legally assigned to a job during a RIF, then illegally removed from that job for alleged incompetency, despite never having been permitted to perform that job for even a single second.

While this Court has established various proof schemes by which aggrieved Federal employees charging racial discrimination may vindicate their rights under Title VII of the Civil Rights Act of 1964, as amended, none of these tests apply to petitioner's case. Petitioner, after all, was a lone black who claimed rights under RIF regulations in the

"white preserve" of scientific research where no other civil service black scientists had ever been permitted whatever their qualifications. It is well-known that scientific research, through circumventions like those elucidated above, is almost entirely closed to blacks.

Because of the uniqueness of petitioner's case, and the lack of Supreme Court teachings related to it, the courts below are free to engage in creative solutions which sometimes deviate from Congressional intent.

This case underscores emphatically the need for specific guidance concerning the standards for an award of summary judgement. The role of Rule 56 in cases such as these has become unclear, reguiring amplication by this Court. For example, the credibility of Dr. Kohn's assertions that petitioner was not qualified to hold the position to which he was assigned despite his having been certified as qualified by a special RIF committee empowered

to make such decisions, flies in the face of documentary evidence, the RIF regulations, and standard RIF procedures as they apply to white employees. Petitioner's charges concerning these facts certainly precluded an award of summary judgement.

Additionally, there has been great conflict at the Circuit Court level over Rule 56. Some courts, such as the Fourth Circuit, hold that summary judgement may be awarded despite evidence sufficient enough to establish a prima facie case. Grigsby v. Reynolds Metal Co., 821 F.2d 590 (11th Cir. 1987); Carey v. United States Postal Service, 812 F.2d 621 (1st Cir. 1987); Dea v. Cook, 810 F.2d 857 (5th Cir. 1986) and the present case (4th Circuit, 1988). Other circuits restrict summary judgement when a prima facie case is established. City of Monrovia, supra:

> Once a prima facie case is established either by the introduction of actual evidence or reliance on the McDonnell-Douglas presumption, summary judgement for the defendant will ordinarily not be appropriate on any ground relating to the merits because the purpose of a Title VII

dispute is the elusive factual question of intentional discrimination...Lowe v. City of Monrovia, Supra, 775 F.2d at 998. See also Williams v. Edward Appffels Coffee Co., 792 F.2d 1482, 1486 (9th Cir. 1986).

The inconsistencies among the Federal courts as well as the loopholes created by the interaction of Title VII with Rule 56 merits the attention of this Court.

CONCLUSION

Based upon the forgoing arguments, cases and authorities, petitioner respectfully prays that this Court issue a writ of certiorari to the Fourth Circuit Court of Appeals.

Dated: 27th Day of February 1989.

William A. FitzGerald

Petitioner Pro Se

PROOF OF SERVICE

It is hereby certified that the original and 39 true copies of this Petition For writ of certiorari were hand-carried by the Petitioner to Mr. J.F. Spaniol, Jr., Clerk of the U.S. Supreme Court, at One First Street, N.E.,; Washington, D.C. 20543; and that three true copies were mailed first class mail, postage prepaid, to the Solicitor General; Department of Justice, Room 5614; Washington, D.C. 20530.

This 27th Day of February 1989.

William A. FitzGerald

William A. FitzGerald
Pro Se
Post Office Box 2043
Rockville, Maryland 20852
Tel. No. (301) 443-6460

88-1413

Supreme Court, U.S.
FILED
FEB 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

****

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

****

WILLIAM A. FITZGERALD, PETITIONER

V.

DON M. NEWMAN, ACTING

SECRETARY, U.S. DEPARTMENT

OF HEALTH AND HUMAN SERVICES

****

Appendix

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

****

WILLIAM A. FITZGERALD
POST OFFICE BOX 2043
ROCKVILLE, MD 20852
(301) 443-6460
PRO SE

APPENDIX A

Unpublished Decision, U.S. Court

Of Appeals, Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2518

WILLIAM A. FITZGERALD
Plaintiff - Appellant

v.

BOWEN, SEC., Secretary Department of Health and Human Services
Defendant - Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frederic N. Smalkin, District Judge. (C/A No. 86-2819)

Submitted:July 27, 1988;Decided: Oct. 6, 1988

Before PHILLIPS, SPROUSE, AND WILKINSON, Circuit Judges.

William A. Fitzgerald, Appellant Pro Se., Breckinridge Long Willcox, U.S. Attorney; Juliet Ann Eurich (OFFICE OF THE U.S. ATTORNEY); Linda Ann Ruiz (U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES) for Appellee.

PER CURIAM:

William A. FitzGerald appeals from the district court's order granting defendant's motion for summary judgement in Fitzgerald's employment discrimination action brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-16. Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. FitzGerald v. Bowen, C/A No. 86-2819 (D. Md. Feb. 12, 1988). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

Fourth Circuit Rehearing Denied

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Filed
Nov 17 1988
U.S. Court of
Appeals Fourth
Circuit

No. 88-2518

William A. Fitzgerald,

Plaintiff-Appellant,

v.

Bowen, etc.,

Defendant-Appellee.

On Petition for Rehearing

Upon consideration of appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Sprouse, with the concurrence of Judge Phillips and Judge Wilkinson.

For the Court

s/ John M. Greacen

CLERK

APPENDIX C

District Court Decision

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

DR. WILLIAM A. FITZGERALD :

v. :

CIVIL NO. S 86-2819

DR. OTIS R. BOWEN, SECRETARY:
DEPARTMENT OF HEALTH AND
HUMAN SERVICES

MEMORANDUM

Plaintiff, Dr. William A. FitzGerald, has brought this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e, alleging employment discrimination on the basis of race and also alleging reprisal for filing an employment discrimination claim. Plantiff's amended complaint alleges that defendant discriminated against him on the basis of race as follows: (1) attempted to deny him the right to apply for a research position for which he was qualified; (2) wrongfully attempted to keep him from "bumping"

another employee during the 1981 Government-wide reduction in force ("RIF"); (3) prevented him from performing his scheduled duties and receiving the experience he would have gained as a researcher on the "Polish Study;" (4) inaccurately appraised his work performance; and (5) denied him the opportunity for promotion. Plaintiff's amended complaint also alleges that as a result of his filing a race discrimination claim in April, 1984, plaintiff was subjected to retaliatory treatment in the form of inaccurate evaluations, harassment and a pattern of being given "make-work."

Defendant has moved for summary judgment on two grounds: (1) that plaintiff is barred from raising allegations of discrimination in connection with the 1981 RIF, because plaintiff did not file an administrative complaint concerning these allegations within 30 days of the date of the alleged instances of discrimination, and (2) that defendant is entitled to summary judgment on the merits,

because there is no genuine dispute as to any fact material to this action, and defendant is entitled to judgment as a matter of law. Plaintiff has responded. No oral hearing is necessary to decide this motion. Local Rule 6, D. Md. (1)

I. Factual Summary

Plaintiff is a black male with a Ph.D. in sociology. He began his employment with the federal government on March 24, 1980, as a Program Analyst in the Office of Program Development and Analysis, National Institute on Drug Abuse ("NIDA"), which is part of the Alcohol, Drug Abuse and Mental Health Administration ("ADAMHA"), which, in turn, is a component of the Department of Health and Human Services ("DHHS"). In the fall of 1981, ADAMHA underwent an agency-wide RIF. On November 20, 1981, plaintiff was notifed by letter that an

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(1) Subsequent to the filing of plaintiff's response, plaintiff discharged his lead counsel, Mr. Rosenthal, evidently over a fee dispute.

employee with higher retention status was entitled to his position and that he would be separated pursuant to the RIF, effective December 12, 1981. Plaintiff's retention status was in Group IIA.

Upon learning of his impending separation, plaintiff studied the retention register and identified positions he felt he was qualitifed to perform. One of these positions was Research Sociologist, GS-184-12, in the Laboratory for Socio-Environmental Studies ("LSES"). The position was held by Dr. JoAnne Miller, a white female. Plaintiff applied for the position. By letter dated December 1, 1981, Ms. Nordstrum, Director of ADAMHA Personnel, indicated to plaintiff that he was qualified for a Research Sociologist position, GS-12, but that the position for which he applied required knowledge of computer technology at a level greater than his records

indicated that plaintiff had.(2) Plaintiff wrote back to Ms. Nordstrom, spoke with her, and contacted a television reporter. Ms. Nordstrom testified at his deposition that she asked the review committee to re-evaluate plaintiff's qualifications, after which he was deemed to be qualified for the position. Plaintiff was offered, and accepted, the position.

Plaintiff's acceptance of the position resulted in Dr. Miller being bumped. Dr. Melvin Kohn, Chief of LSES, was upset by this turn of events, because Dr. Miller had been working on co-ordination of the data analysis of a Polish replication of studies of social stratification, occupational structure and psychological functioning ("the Polish Study"). In Dr. Kohn's opinion, Dr. Miller was

---

(2) As it turned out, computer programming was not a requirement of the job, but familiarity with the computer language LISREL was required. The relevance of this fact will be discussed post.

singularly qualified to perform the tasks she was assigned. Dr. Kohn spoke with the plaintiff over the telephone, then met with him in person, to try to dissuade plaintiff from bumping Dr. Miller. According to plaintiff's recollection of the meeting, as described at his deposition and in his personal notes, Dr. Kohn attempted to persuade plaintiff to take a part-time position that had been offered him at NIDA. Plaintiff states that Dr. Kohn explained to him that the position at LSES required skills that plaintiff did not have, specifically, the ability to use the LISREL computer language. Plaintiff recounts the conversation as follows:

> In plain English he said "You're not qualified for this job, and if you come here, I am going to be forced to rate you on the same level I do everybody else, and this means I am going to give you low performance appraisals. This will effectively destroy your career. For your own benefit, I advise you not to take this job and to take the part-time job."

(Plaintiff's Deposition Transcript at 107).

Plaintiff then indicated that he would be foolish to turn down a full-time job for a part-time job. Dr. Kohn then allegedly said that someone in personnel had told him to put plaintiff in the job, let him fail, and fire him. Plaintiff replied that, if given the chance to fail, plintiff would in fact succeed, not fail. Plaintiff admitted that he did not have the required knowledge of the LISREL language, but that he could do the job anyway. At his deposition, Dr. Kohn explained his decision that plaintiff was not qualified to do Dr. Miller's job as follows:

> Let me tell you why I was so certain he couldn't possibly do it. We are dealing with very advanced statistical techniques. Joanne Miller had gone to graduate school at the department of sociology in the country that is most reknowned [sic] for training people in quantitative data analysis. She had come to our laboratory and had a five year post doctoral fellowship nad had a great deal of training and [a] huge amount of experience that carried [sic] out some very intricate analysis. At the point where she came onto the job for the four-year term she was already very well skilled. We are now almost two years into the four years and she had had a great deal more experience in, of course, national comparative

analysis and basically was the author on two major papers.

Fitz had gone to a graduate school which does not pride itself on training people in quantitative data analysis. It is simply not its forte.

He told me in the course of the discussion he had very little in the way of training and very little in the way of experience. He wasn't anywhere near prepared to take on the job. He wasn't prepared to start to do the kinds of things that Joanne did because he didn't have in his background the kinds of things that Joanne had had in graduate school no less the five years post doctoral. There is no reason why you would have to have that kind of training to be a good sociologist. You can do other kinds of things in sociology but ours is a particular subspecialty in which we are developing very advanced techniques. And when he said I can do this in three months, all it meant was he didn't know what the this was. He couldn't possibly do it. He could be a raving genius and I had not reason to doubt his intellectual facility. But he did not have the training or experience.

(Kohn Deposition Transcript at 57-58).

On December 15, 1981, Dr. Kohn wrote to the Personnel Office to protest the decision to let plaintiff bump Dr. Miller. Dr. Kohn persuaded Personnel to provide a second position for LSES so that Dr. Miller could retain her position and complete her work on

the Polish Study, and plaintiff could also become a member of LSES. By memorandum dated January 22, 1982, authorization was approved to establish a second term appointment for a Research Sociologist, GS-184-12, in LSES. This position was established for plaintiff. The appointment began January 24, 1982 and coincided in duration with the appointment held by Dr. Miller, which was to expire on February 23, 1984. The reason stated for the appointment was to provide much-needed assistance to complete the Polish Study within the allotted time frame.

Plaintiff wrote a position description for this position. That description included the necessity of being familiar with the LISREL computer program to analyze research data. Plaintiff and Dr. Kohn apparently agreed that plaintiff would take a course in LISREL at the University of Maryland. Plaintiff had not taken the prerequisites for the LISREL course, so he had to complete several other courses

before taking the LISREL course. The Department gave plaintiff permission to take the prerequisites, and apparently paid for all but one of the courses. During the time when plaintiff was taking the courses, his workload was decreased. Plaintiff worked on one project with Dr. Miller on adolescent sex role orientation. Plaintiff requested to be allowed to work on the Polish Study, but Dr. Kohn and Dr. Miller suggested that plaintiff begin his laboratory training on a project that was just beginning so that he could learn the appropriate statistical techniques. Dr. Kohn and Dr. Miller considered the Polish Study to be too far along to be of much help in training plaintiff. Plaintiff disputes that his position was to be that of a trainee. Plaintiff contends that, slthough he was never allowed to work on the Polish Study, he was evaluated as if he had been performing those tasks.

In April, 1982, Dr. Miller was promoted to

a GS-13, pursuant to a request that had been made by Dr. Kohn in May, 1981. In May, 1982, Dr. Miller accepted a position at the National Science Foundation. Dr. Miller continued to work in LSES one day a week, without pay.

In February, 1983, Dr. Kohn gave plaintiff a "fully satisfactory" rating for his performance in the period of October 1, 1981, to December 31, 1982. Nowhere on any of the review sheets attached to the appraisal is the Polish Study mentioned. (Paper No. 21, Attachment Q). In fact, the Supervisor's Comments under Job Element No. 1 read as follows: "Dr. Fitzgerald [sic] has begun to do statistical analyses in conjunction with Dr. Miller and me. The work is at an early stage. It has begun well. With more experience and further training, Dr. Fitzgerald [sic] should become more and more expert." (Id. at 2).

In October, 1983, the Associate Director for IRP sent a written inquiry to all Laboratory Branch Chiefs in IRP asking whether

any of them had a position available for plaintiff at the expiration of his term appointment. No such position was found. The Personnel Office then offered plaintiff a position as a Program Analyst at NIDA, doing work similar to that he had been doing prior to the original RIF. The people in the Personnel Office did this instead of conducting a mini-RIF, because they wanted to avoid the domino effect that such a mini-RIF would create. According to defendant, the position offered plaintiff was equivalent to one to which he would have been entitled had the mini-RIF been conducted.

The facts relevant to plaintiff's claim of reprisal after he returned to NIDA will be discussed in the section of the Memorandum addressing the allegations of reprisal.

On February 23, 1984, plaintiff was reassigned to NIDA. In March, 1984, plaintiff filed a formal EEO complaint. In May, 1986, plaintiff received a final decision of the

EEOC; that decision found no racial discrimination. In September, 1986, plaintiff filed this suit.

II. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be granted if there is no genuine dispute as to material fact and the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine dispute as to material fact. Celotex Corporation v. Catrett, 106 S. Ct. 2548, 2553 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). The moving party need not present evidence. It need only point out the lack of genuine dispute as to material fact. Celotex, 106 S. Ct. at 2553. Once the moving party has met this burden, the nonmoving party must set forth evidence of specific facts showing the existence of a genuine issue for trial. Id.; Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2510 (1986); Adickes, 398 U.S.

at 160 n.23.

In deciding the motion, the Court must view the material facts, and the inferences properly drawn therefrom in the light most favorable to the nonmoving party. Anderson, 106 S. Ct. at 2513 (1986); Adickes, 398 U.S. at 158-59. Even where there is no dispute as to the basic facts, summary judgment is inappropriate if the parties disagree on the inferences that reasonably may be drawn from those facts. Morrison v. Nissan Motor Co., 601 F.2d 139, 141 (4th Cir. 1979); Anderson, 106 S. Ct. at 2510. Only facts that may affect the outcome of the case under governing law are "material." Id. Moreover, a factual dispute is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id.

The Supreme Court wrote, in Anderson, as follows:

> The petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that

> the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.
>
> * * *
>
> The Court has said that summary judgment should be granted where the evidence is such that it "would require a directed verdict for the moving party." And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; sumary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

106 S. Ct. at 2511-12 (citations omitted). Distilling the holdings in Anderson and Celotex, this Court concludes that summary judgment must be granted unless the plaintiff provides sufficient evidence to allow a reasonable fact-finder to find in his favor under the governing law. The substantive law identifies which facts, or inferences

therefrom, are material and also identifies the burdens of proof against which the presence or absence of material factual dispute is to be gauged. Anderson.

II. Title VII

Plaintiff has sued under Title VII on the grounds that he alleges he was discriminated against, on the basis of his race. To prevail on these claims, plaintiff must prove some discriminatory animus, i.e., that his employer intentionally treated him less favoably than his non-minority peers because of his race. Texas Department of Comunity Affairs v. Burdine, 450 U.S. 248, 256 (1981); Gairola v. Virginia Department of General Services, 753 F.2d 1281, 1285-86 (4th Cir. 1985). Intent to discriminate may be proved by circumstantial evidence, such as conduct or a pattern of conduct inexplicable on grounds other than race. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-6 (1977).

In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court set out a three-step analysis for approaching disparate treatment cases under Title VII. In the traditional failure to hire case, the plaintiff may establish a prima facie case of discrimination by establishing 1) that he was a member of a protected group; 2) that he applied for and was qualified for a job for which the employer was seeking applicants; 3) that despite being qualified he was rejected; and 4) that after his rejection the position remained open and the employer continued to seek applicants. McDonnell Douglas, 411 U.S. at 802. As the facts vary in each case, so will the proof required to establish a prima facie case. Id. at 802 n.13; Burdine, 450 U.S. at 253 n.6.

If the plaintiff submits evidence sufficient to establish a prima facie case, the burden of production shifts to the defendant to submit evidence of a legitimate

nondiscriminatory reason. The defendant need not persuade the Court that the proffered reasons were the actual reasons for dismissal. The plaintiff must then produce evidence of pretext. The ultimate burden of persuasion remains at all times with the plaintiff. Burdine, 450 U.S. at 254. In a summary judgment context, where the employer articulates a legitimate nondiscriminatory reason for its actions, the plaintiff may still prevail by submitting evidence that would support a reasonable jury conclusion that the proffered reason was pretextual. A plaintiff may prevail "directly by persuading the court that discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proferred explanation is unworthy of credence." Id. at 256.

IV. Plaintiff's Allegations Relating to the RIf

Assuming for the purposes of discussion

that plaintiff could establish a prima facie case under the McDonnell-Douglas test, summary judgment must be granted, because defendant has offered legitimate, nondiscriminatory reasons for the actions relating to the RIF, and plaintiff has submitted no evidence whatsoever that the proferred reasons are merely a pretext for racial discrimination. Defendant has submitted evidence that members of the Department attempted to convince plaintiff not to bump Dr. Miller because she was in charge of the Polich project, a complicated project that was already two years underway. Plaintiff has submitted no evidence that might even remotely suggest that this reason was pretextual. Plaintiff merely asserts his own subjective beliefs that he could have done Dr. Miller's job, if given the chance. There is no evidence, either direct or indirect, to suggest any discriminatory animus in this decision. In fact, it is clear from the evidence submitted that the people at

LSES went out of their way to accommodate plaintiff. Therefore, summary judgment must be granted as to plaintiff's first two claims--that defendant wrongfully attempted to deny him his right to apply for a research position for which he was qualified; and that defendant wrongfully attempted to keep him from bumping another employee during the 1981 RIF.

Because the Court has found that summary judgment must be granted as to these claims, it need not address defendant's argument that the claims are barred on other grounds.

V. Plaintiff's Treatment While at LSES

Plaintiff also claims that defendant discriminated against him by denying him the opportunities to perform his scheduled duties and to receive the experience he would have gained as a researcher on the Polich Study. Again, assuming for the purposes of discussion that plaintiff could establish a prima facie case under McDonnell-Douglas, defendant has

submitted evidence of a legitimate, nondiscriminatory reason for this action; and plaintiff has failed to submit any evidence that the reason was pretextual. Although the job description of plaintiff's position at LSES stated that he was needed to work on the Polish Study and that this would be his assignment, it is clear that plaintiff either understood or should have understood that this was conditional upon his acquiring the necessary LISREL skills. This also was listed in his job description. Plaintiff did not have this requisite job-specific skill when he was first hired. He could not take the LISREL course at the University of Maryland until he took other prerequisite courses. Dr. Kohn and Dr. Miller both believed that it would have been foolish to attempt to train plaintiff on the Polish Study without his having those courses. These are all legitimate reasons why plaintiff was not allowed to work on the Polish Study. As Dr. Kohn stated in his

deposition testimony, plaintiff was a very good sociologist, but he was not trained in the type of methods that were necessary for that particular project. Plaintiff has submitted no evidence that these reasons were merely a pretext for discrimination. Therefore, summary judgment must be granted as to this claim.

Likewise, with regard to the allegations that plaintiff was improperly evaluated while he was at LSES, assuming again that plaintiff could establish a prima facie case, defendant has articulated a legitimate nondiscriminatory reason for the action, and plaintiff has submitted no evidence of pretext. The valuations, on which plaintiff received a "fully qualified" rating, were completely justified by the fact that plaintiff was taking courses most of the time he was at LSES, and, therefore, plaintiff was not performing his duties in an "excellent" manner, as he had in his previous position.

Plaintiff suggests that he was being evaluated for work that he did not do, i.e. the Polish Study; however, a review of the evaluations reveals no mention of the Polish Study. There is no evidence that the proffered reason--that he deserved the rating he got--was a pretext for racial discrimination. Therefore, summary judgment must be granted as to this claim.

Plaintiff also charges that he was denied the opportunity for promotion. Plaintiff cites Dr. Miller's promotion to a GS-13 during the period of his employment at LSES, coupled with his own non-promotion, as evidence of discrimination. To establish a prima facie case with regard to promotions, a minority plaintiff in this Circuit must demonstrate that he was better qualified for promotion than the non-minority individual who was promoted. Holmes v. Bevilacqua, 794 F.2d 142, 147 (4th Cir. 1986) (en banc); Gairola v. Commonwealth of Virginia Department of General Services, 753 F.2d 1281, 1287 (4th Cir. 1985);

Young v. Lehman, 748 F.2d 194, 198 (4th Cir. 1984), cert. denied, 471 U.S. 1061 (1985). Plaintiff has not submitted evidence that he was even as qualified as, much less more qualified than, Dr. Miller. Moreover, Dr. Miller's promotion came as a result of request made by Dr. Kohn before plaintiff even came on the scene. Summary judgment must be granted as to this claim as well.

VI. Retaliation

Plaintiff alleges that he was retaliated against for filing his claim of racial discrimination by being given an inaccurate performance appraisal, being given only "make-work," and being harassed and insulted. A plaintiff may resort to the McDonnell-Douglas proof scheme, a plaintiff must prove three elements, as follows: (1) the employee engaged in protected activity; (2) the employer took adverse employment action against the employee; and (3) a causal connection existed between the protected

activity and the adverse action. Ross, 759 F.2d at 365. Defendant argues that plaintiff fails on two of these elements. Defendant first arques that plaintiff fails to prove that adverse action was taken against him. Defendant also argues that no causal connection exists between the protected activity and the alleged adverse action.

Even if the complained-of activities were sufficient to establish adverse personnel action, the Court concludes that there is no evidence upon which a reasonable fact-finder could find a causal connection. Defendant has submitted the declaration of Ms. Becker (3),

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(3) Plaintiff challenges the propriety of Ms. Becker's declaration. The declaration comports with the requirements of 28 U.S.C. Sec. 1746 to the extent that it is made under the penalties of perjury. It is not dated. However, it is obvious from the body of the declaration that it was made after June, 1985. See Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312, 315-16 (D. Md. 1983). Moreover, the moving party need not submit evidence at the summary judgment stage; he only need point out the

in which Ms. Becker states that during the time period from 1984-1985 she was unaware that plaintiff had filed an EEOC complaint against anyone. Plaintiff argues that she was put on notice by his memorandum of December 3, 1984. That memorandum, although it mentions "the ugly term, `Retaliation,'" never mentions that plaintiff filed an EEOC complaint or that plaintiff felt that he was being retaliated against for exercising any rights (Paper No. 24, Attachment 24). Thus, even if Ms. Becker were aware of the memorandum, there is no evidence that she was aware that an EEOC complaint had been filed. In the absence of such knowledge, there can be no causal connection between a complaint and any alleged adverse treatment. See, e.g., Talley v. U.S. Postal Service, 720 F.2d 505, 508 (8th Cir. 1983).

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weaknesses in the plaintiff's case. Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1986).

In sum, the only "evidence" put forth by plaintiff that any of the activities complained of by plaintiff--from the RIF in 1981, through plaintiff's treatment upon his return to NIMA--were the result of any intent to discriminate against plaintiff because of his race, or to retaliate against him because of his complaints of discrimination, is plaintiff's own subjective belief that he was discriminated against. Such belief, in the absence of evidence of discrimination, is insufficient to support a fact-finding in favor of plaintiff, and, consequently, is insufficient to withstand a motion of summary judgment. See Goldberg v. B. Green & Co., 836 F.2d 845 (4th Cir. 1988) (age discrimination).

Accordingly, a separate Order and Judgment will be entered granting defendant's motion for summary judgment and entering judgment in favor of defendant and against plaintiff.

Dated: February 12th, 1988

___s/ Frederic Smalkin___

Frederic N. Smalkin

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

DR. WILLIAM A. FITZGERALD :

v. :

CIVIL NO. S 86-2819

DR. OTIS R. BOWEN, SECRETARY:
DEPARTMENT OF HEALTH AND
HUMAN SERVICES

ORDER AND JUDGMENT

In accordance with the foregoing Memorandum, IT IS, this 12th day of February, 1988, by the United States District Court for the District of Maryland, ORDERED:

1. That defendant's motion for summary judgment BE, and the same hereby IS, GRANTED;

2. That judgment BE, and the same hereby is, ENTERED in favor of defendant and against plaintiff;

3. That this case BE, and the same hereby IS, CLOSED; and

4. That the Clerk of Court mail copies of this Order and Judgment and of the foregoing Memorandum to counsel for the parties.

__s/_Frederic_N._Smalkin_

Frederic N. Smalkin

United States District Judge

APPENDIX D

The EEOC Decision

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Office of Review and Appeals

5203 Leesburg Pike, Suite 900

Falls Church, Virginia 22041

William Fitzgerald,	)	
Appellant,	)	Appeal No. 01862296
v.	)	Agency No. ADM378-84
Department of Health and Human Services,	)	
Agency.	)	

DECISION

INTRODUCTION

On May 29, 1986, William Fitzgerald (hereinafter referred to as appellant) initiated an appeal to the Equal Employment Opportunity Commission (EEOC) from the final decision of the Department of Health and Human Services (hereinafter referred to as the agency), dated May 9, 1986, finding that he was not discriminated against because of race/color (Black) and reprisal when he was not given an

opportunity to perform the duties of his position description. Appellant's appeal was initiated pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq. We find that appellant's appeal was timely filed in accordance with 29 C.F.R. Section 1613.233. Accordingly, appellant's appeal is accepted pursuant to EEOC Order No. 960, as amended.

ISSUE PRESENTED

The issue presented is whether the agency discriminated against the appellant on the bases of his race/color (Black) when he was allegely denied the opportunity to perform the duties of his position description.

BACKGROUND

Appellant was employed by the agency as a Program Analyst, GS-12 National Institute of Drug Abuse. He had been working since January 24, 1982, in the temporary position of Research Sociologist, GS-12. The position had an expiration date of February 24, 1984.

Appellant contacted an Equal Employment Opportunity (EEO) Counselor on March 21, 1984, and alleged that he was discrimianted against on the bases of race/color (Black) and reprisal concerning:

> 1. The alleged falsification of ADAMHA Personnel records to prevent me from applying for a research position to which I am entitled under RIF (Reduction in Force) regulations; 2. Retaliatory/ reprisal action on the part of high level conspirators to violate my RIF rights by engaging in open attempts to frighten me off the job; 3. Retaliatory/reprisal action to prevent me from even attempting to perform my scheduled duties; 4. Retaliatory/reprisal action by LSES Lab Chief who gave me not a single assignment of any kind during the entire 2 years I was in the LSES; 5. Discrimination based upon race to prevent me from successfully learning my scheduled job or participating in the superb training and experience available to majority race job incumbents; 6. Low and even irregular appraisals although I was never tested in any form or fashion.

The EEO Counselor's report indicated that appellant filed an appeal to the Merit Systems Protection Board (MSPB) on March 8, 1984, concerning the same matters. The record contains a letter from appellant to the Office of Special Counsel (MSPB) dated March 27, 1984,

in which appellant stated that he had recently learned the regulations governing "Mixed Cases Complaints" abolished a complainant's right to file simultaneous MSPB appeals and EEO complaints. It appeared he "should have filed [his] EEO complaint first and reserved the MSPB option as the Court of Final Appeal." Appellant asserted that if his interpretation of the new rules governing Mixed Cases Complaints were correct, he requested that MSPB allow him to withdraw his complaint to the Special Counsel or in the alternative that he be permitted to amend his complaint to the MSPB to include the EEO portion of his case. The record does not specifically address appellant's letter to the MSPB, but the agency processed appellant's complaint under EEO complaint procedures as set forth in 29 C.F.R. Section 1613.212 et seq.

In his formal Equal Employment Opportunity Complaint dated April 24, 1984, appellant alleged discrimination based on race, color and

reprisal in that the agency subverted the RIF process; erected racially restrictive position requirements, falsified records; initiated retaliatory action based upon race to run him off the job; and misappropriated government resources since he was paid for "two years of forced idleness for doing absolutely nothing."

With respect to the 1981 RIF, appellant stated that he was transferred into the Laboratory of Socio-enviornmental Studies at the National Institute of Mental Health (NIMH) for the purpose of participating in the Polish Study. He had to "bump" the incumbent Grade III temporary employee whose appointment would end on February 23, 1984. Appellant contended he was told that at the conclusion of this appointment, he would retain RIF rights and could "bump" into another position. However, the Grade III temporary employee was not released, but was retained and became appellant's supervisor.

Appellant contended that his transfer was

met with hostility and resistance, probably because the NIMH intramural Research Program (IRP) "was deemed a white preserve and seemingly was rigged to remain that way." There were no blacks on the IRP permanent medical staff. The new Lab Chief attempted to declare him unqualified for the job, but lacked the courage to challenge his abilities.

When his temporary appointment terminated on February 23, 1984, appellant was transferred back to the National Institute on Drug Abuse, supposedly, in accordance with RIF procedures. Appellant contended that since he was unfairly deprived of the opportunity to participate in the Polish Study as outlined in his official position description and also unfairly denied training, he should be given two years of training that was deliberately denied him.

The agency accepted for investigation only the allegation of appellant's formal complaint that because of his race and color, he was denied on February 23, 1984, an opportunity to

perform the assigned duties which were in his official position description. The acceptance letter was dated September 25, 1984. On February 14, 1986, the agency issued a Notice of Proposed Disposition finding no discrimination based on race and color. Appellant did not request a hearing on his complaint. The agency issued a final agency decision on May 9, 1986, adopting the proposed disposition and finding no discrimination. Appellant made no contentions at the time of his appeal, but stated that he would submit a statement in support of his appeal within the required time frame. He did not.

ANALYSIS AND FINDINGS

Although appellant raised other allegations in his complaint, the agency accepted for investigation only the allegation that because of appellant's race and color, he was denied an opportunity to perform his assigned duties. Appellant raised allegations of reprisal upon his EEO Counselor contact and in his formal

complaint. The Commission finds no evidence that these allegations were investigated. There is no indication in the record why the allegations were not accepted or how the agency disposed of the issues raised.

An agency must accept allegations of discrimination that have been timely raised and which were covered by Title VII and EEO Regulations . 29 C.F.R. Sections 1916.212, .214. The Regulations also required a thorough review of the circumstance under which the alleged discrimination occurred. 29 C.F.R. Section 1613.216. If allegations are rejected, the agency is required by regulation to notify the appellant of the reasons for rejection.

The Commission also finds that there appears to be some confusion on appellant's part regarding a "Mixed Case Complaint." A Mixed Case Complaint is defined in relevant part as: "A complaint of employment discrimination filed with a federal agency, based on race, color, religion, sex, national

origin, handicap, age, and/or reprisal, related to or stemming from an action taken by an agency against the complainant which action may be appealed to the MSPB, pursuant to any law, rule or regulation:..." 29 C.F.R. Section 1613.402. The agency's responsibilities in processing mixed case complaints are set forth in 29 C.F.R. Section 1613.405.

The EEO Counselor's report states that appellant filed an apeal in this matter to the MSPB. It does not appear from the record that appellant's complaint comes within the definition of a mixed case complaint. The Commission finds no evidence that appellant was advised relative to his concerns.

The Commission further finds that appellant's complaint file contains voluminous documents. However, many of these documents concern matters totally unrelated to the issues raised in appellant's complaint. The Commissions finds, however, that the agency's processing of appellant's complaint is

inadequate and therefore remands the case to the agency.

CONCLUSION

For the reasons stated, the final agency decision is vacated and the complaint is remanded to the agency for additional investigation and processing consistent with the provision of 29 C.F.R. Section 216 et seq and this opinion. Upon completion of the investigation the agency is directed to issue a new final agency decision consistent with this decision and EEO regulations governing the processing of complaints.

IMPLEMENTATION OF THE COMMISSION DECISION

Under EEOC Regulations, compliance with the Commission's corrective action is mandatory. The agency must report to the Commission, within thirty (30) calendar days of receipt of the decision that corrective action has been taken. The agency's report should be forwarded to the Director of Compliance, Office of Review and Appeals, Equal Employment Opportunity

Commission, 5203 Leesburg Pike, Suite 900, Falls Church, VA 22041. A copy of the report should be sent to the appellant.

A statement of appellant's rights (R-1) is attached to this decision.

FOR THE COMMISSION:

29 Sep 1987 — s/Dolores L. Rossi

Date — Dolores L. Rossi, Director

Office of Review & Appeals

APPENDIX E

Petitioner's Letter,

To The District Court

With 3 Attachments

And The Court's Reply

19617 Ridge Heights Drive

Gaithersburg, Maryland 20879

February 4, 1988

The Honorable Frederic N. Smalkin

United States District Judge

United States District Court for

the District of Maryland

208 U.S. Courthouse

201 W. Lombard Street

Baltimore, Maryland 21202

Re: FitzGerald v. Bowen

Civil Action No. S-86-2819

Dear Judge Smalkin:

I am the Plaintiff in the above referenced case and am now without legal representation of any kind. My lead attorney, Barry Rosenthal, Esq., was acrimomiously discharged by me for submitting a $5,000 bill, allegedly for work done on a single brief -- Plaintiff's Opposition to Defendant's Motion For Summary Judgement. A copy of this outrageous bill is enclosed together with my response to it. The

situation strikes me as one of exploitation.

While I would like to retain my other attorney, Gerald Solomon, Esq., all the funds reserved for this case have been depleted by problems with the above mentioned relationship. In addition, Mr. Solomon has long refused to function in the role of lead attorney. I believe he will withdraw as well.

I respectfully request permission to strike Mr. Barry Rosenthal from this case and to enlist the services of another counselor, if one can be found who is willing to accept my meagre resources. If one can not be found, I will ask permission to function pro se at a later date.

Thank you for your kindness in this matter.

Sincerely yours,

s/William FitzGerald

William FitzGerald, Ph.D.

19617 Ridge Heights Drive

Gaithersburg, Maryland 20879

February 3, 1988

Barry Rosenthal, Esq.

Bromberg & Rosenthal

50 West Montgomery Avenue

Suite 260

Rockville, Maryland 20850

Dear Barry:

I received your bill for $4,983 and think its's despicable. I refuse to pay you $5,000 for writing a single, simple brief, especially when I, myself, wrote the first draft for you and collected all the documents. You only course is to sue me. If you don't sue me, I intend to sue you and the Bar Association for recommending you.

This case should have been over with the Goodwin Order to Compel, followed by my motion to Reconsider, if you hadn't concealed the judge's decision from me until it was too

late to file. You promised to have the present brief finished by COB January 11th and repeatedly drew it out. Do you think I'm going to pay for that?

It is quite clear to me what is going on. It is my personal opinion that you've been trying to scuttle this case for a long time. That's why I decided to bring in someone else to handle the last two depositions. But let me inform you that I will continue to fight this case even if I have to mortgage my house and everything I will ever own in life. The U.S. Government is quilty of unconscionable and grossly discriminatory behavior and I will go down in a puddle of blood before I let it get away with it. But I wouldn't be too smug if I were you. Being an attorney gives you most of the cards but not all. There is also a thing called character. You've seen the intensity in which I fight when I've been grievously wronged.

Obviously, you are discharged immediately with this letter and I want my files. I will go to my union for help and perhaps it will pick up part of the costs. I also will go to Baltimore to see if you filed what you were supposed to have filed. In addition, your bill and this letter will be submitted to Judge Smalkin in a petition to have you removed so he will know the reason for my request. Poor people may not have many options but they don't always submit. You've broken my purse; you can't and never will break my spirit. Nobody can.

Sincerely,

s/

William FitzGerald, Ph.D.

BROMBERG & ROSENTHAL
50 West Montgomery Avenue
Rockville, Maryland 20850

(301) 251-6200

February 1, 1988

Dr. William A. FitzGerald

19617 Ridge Heights Drive

Gaithersburg, Maryland 20879 7-83349-L

FOR PROFESSIONAL SERVICES RENDERED:

Re: FitzGerald v. Bowen

For the Period: 12/16/87 - 01/31/88

01/02-meeting, review Motion SJ	1.0	
01/11-tc Fitz/tcRuiz/Motion for Enlargement	1.0	N/C
01/11-research re:opp	1.0	
01/18-research re:opp	2.0	
01/19-research re:opp	6.0	
01/21-drafting memo/addl. research	6.0	
01/25-prep. memorandum	9.5	
01/26-review record/memorandum	3.3	
01/26-memorandum	5.0	
01/28-draft memorandum	11.0	

01/28-modify memorandum	3.0	
01/29-modify/finalize memo/		
/ltrs/packaging	1.5	
TOTAL HOURS	49.3	$4930.00
Less Courtesy Discount		1000.00
Previous Balance		1417.90
Less Payments Received		567.16
Plus Costs Advanced:		
Messenger (1/11) N/C		43.50
Messenger (1/21) N/C		47.50
Messenger (1/29)		53.00
BALANCE DUE UPON RECEIPT		4833.74

If you choose to make a partial payment of 40%:

Amount now due (40% of $3983.00)	1593.20
Balance Carried Forward:	
Invoice dated 12/23/87	850.74
Invoice dated 02/01/88	2389.80
TOTAL ACCURED	3240.54

19617 Ridge Heights Drive

Gaithersburg, Maryland 20879

January 28, 1988

Barry Rosenthal, Esq

Attorney At Law

50 W. Montgomery Avenue, N.W.

Suite 260

Rockville, Maryland 20850

Dear Barry:

This Memorandum of Points, etc. can not go out the way it is. It was agreed between us that the Goodwin section was to remain intact. But the following was removed:

> Obviously someone is not telling the truth. I would be willing to pay out of my own pocket to have the three defendants plus Drs. Schooler and Miller and myself, submit to polygraph examination. If I fail and the others pass, I immediatly shall withdraw all accusations and resign from the Federal Service. If I pass and the others fail, I ask only that the salvageable parts of my life be salvaged.

This must go in there. I would be extremely upset if it were left out. I deem this absolutely vital to my best intersts. I repeat, the Goodwin section must not be touched.

Sincerely,

s/William FitzGerald

William FitzGerald, Ph.D.

UNITED STATES DISTRICT COURT

DISTRICT OF MARYLAND

February 8, 1988

William FitzGerald, Ph.D.

19617 Ridge Heights Drive

Gaithersburg, MD 20879

Re: FitzGerald v. Bowen

Civil No. S 86-2819

Dear Dr. FitzGerald:

This will respond to your letter of February 4, 1988. Please be advised that, by marginal order, I have granted Mr. Rosenthal's motion to withdraw appearance, which has been filed in this matter. With regard to the other matters discussed in your letter of February 4, you should know that this Court does not involve itself in fee disputes between litigants and their present or former counsel.

If you discharge the remaining counsel

who has entered an appearance for you, you may, of course, proceed pro se, but, before doing so, you should consider whether you are able dispassionately and objectively to present for resoution [sic] the matters of fact and law that will have to be decided in the course of this lawsuit. Perhaps, you might wish to look for an attorney who would take your case on a contingency fee basis. In any event, because you are gainfully employed and appear, from your February 3 letter to Mr. Rosenthal, to have mortgageable equity in your house, I should seriously doubt that you would qualify for the appointment of counsel as an indigent.

Very truly yours,

s/

Frederic N. Smalkin

U. S. District Judge

cc Linda R. Ruiz, Esq.

Court File

APPENDIX F

Order To Compel Motion By Petitioner Denied By District Court.

Petitioner's Letter To His Counsel Ascribing Blame To Him For the Defeat of the Compel Motion Due To His Strange Behavior.

UNITED STATES DISTRICT COURT Filed

FOR THE DISTRICT OF MARYLAND Nov 23

1987

WILLIAM A. FITZGERALD, : At Baltimore.

Plaintiff, :

-vs- : Civil Action No.

: S-86-2819; Judge

OTIS R. BOWEN, Sec. : Smalkin.

Dept of Health and :

Human Services, :

Defendant. :

PLAINTIFF'S MOTION TO COMPEL

Plaintiff, William A. FitzGerald, through counsel, respectfully moves for an Order to Compel the defendant to answer a single question propounded during discovery. Plaintiff's grounds for this Motion are set forth in the attached Memorandum of Points and Authorities which is attached hereto and prayed to be made a part hereof.

Respectfully submitted,

BROMBERG & ROSENTHAL

By: s/Barry J. Rosenthal
Barry J. Rosenthal
Trial Bar No. 02889
50 W. Montgomery Avenue
Suite 260
Rockville, Maryland 20850

Attorney for Plaintiff

Motion Denied
s/ FNS
12/11/87

19617 Ridge Heights Drive

Gaithersburg, MD 20879

December 27, 1987

Barry Rosenthal, Esq.

50 W. Montgomery Avenue

Suite 260

Rockville, Maryland 20850

Dear Barry:

I just received your bill together with a copy of Judge Smalkin's December 11th denial of our motion to compel and was tremendously upset. I am upset because Goodwin was permitted to submit an affidavit to Smalkin without my knowledge or without giving me a chance to make a countermove. There are effective measures we could have taken to thwart the Goodwin triumph. I believe what has happened now damages my case, the true extent of which is presently unknown.

If you recall, I spoke very passionately to you about the need to keep me informed every step of the way after my experience with

Simpson. I extracted from you a firm agreement that this would be done before you were engaged as counsel. I spoke very passionately to you again when you failed to unhold [sic] your end of the bargain shortly thereafter. I'm sorry but I do not view this case as business as usual.

Now I also see that Smalkin on 12/18 extended the time for the defendant to file a Motion for Summary Judgement. I have been kept in the dark about this as well.

Sincerely,

s/ William FitzGerald

William FitzGerald, Ph.D.

APPENDIX G

Counsel's Arbitrary Dismissal of

Petitioner's EEO Hearing.

LAW OFFICES

BROMBERG & ROSENTHAL

50 Montgomery Avenue

Suite 260

Rockville, Maryland 20850

(301) 251-6200

December 1, 1987

BY HAND DELIVERY

Mr. Enoch Perry III

Administrative Judge

Equal Employment Opportunity Commission

Baltimore District Office

Washington Hearing Unit

1717 H. Street, N.W., Suite 415

Washington, D.C. 20006

Re: EEO Complaint of William A. FitzGerald

EEOC No. 033-87-x7065

Agency No. ADAMHA - 363-85

Dear Mr. Perry:

Please be advised that the above

captioned matter is currently pending in U.S. District Court for the District of Maryland.

As such, and on behalf of Mr. FitzGerald, we do not desire to proceed with administrative procedures.

If you have any questions or desire additional information, please contact the undersigned.

Thank you for your cooperation.

Very truly yours'

s/Barry Rosenthal

Barry Rosenthal

BJR:kp

cc: Linda Ruiz, Esquire

APPENDIX H

Petitioner's Letter to EEOC

Specifically Requesting the Hearing

That Counsel Concealed

19617 Ridge Heights Drive

Gaithersburg, Maryland 20879

November 6, 1987

Ms. Dolores L. Rozzi

Director, Office of Review and Appeals

Equal Employment Opportunity Commission

5203 Leesburg Pike, Suite 900

Falls Church, Virginia 22041

Dear Ms. Rozzi:

Thank you for forwarding a copy of the EEOC decision of 29 September 1987, Appeal No. 01862296, Agency No. ADM 378-84, which vacated the ADAMHA and Departmental final decisions and remanded the case back to the agency for further investigation.

May I, with all due respect, point out an area in the recapitulation offered in your letter which I believe to be inaccurate? Please note that the final sentence of paragraph four on page three of the EEOC

decision indicates that I did not submit a statement in support of my appeal within the required time frame. The enclosed certified letter receipts and the correspondence related thereto prove such a statement was submitted by me considerably before the filing deadline. Evidently, my submission was never factored into the EEOC decision. Additionally, my attorney of that time, Mr. Gary Simpson, informed me that he also had filed both a request for extension and a legal brief in the case with your August body.

Whatever the facts concerning the latter submission, my statement raised issues of vital importance. I have compelling documentary evidence to support my case, including damaging depositions by the ADO's themselves when they faltered under oath. As a matter of fact, there is also evidence that irregularities were committed by the entire DHHS EEO chain of command in attempting to suppress my case.

Based upon the above, I therefore request a hearing to present my evidence directly to the Commission.

Thank you for this consideration.

Sincerely,

s/

William FitzGerald, Ph.D.

Enclosures:

Cover letter, dated June 17, 1986, addressed to Equal Employment Commssion.

List of "Document Enclosed" Ltr, dated 6/17/86

Documents as represented on the list.

Certified letter receipts and correspondence related thereto.

APPENDIX I

Irregularities In the Handling of Petitioner's Case By His Counsel.

19617 Ridge Heights Drive

Gaithersburg, Maryland 20879

February 18, 1988

Barry Rosenthal, Esq.

Attorney At Law

50 W. Montgomery Avenue

Suite 260

Rockville, Maryland 20850

Dear Barry:

Thank you for your letter of February 17. I'm sorry this had to happen but there is a principle involved here which will not allow me to pay more than the $1,000 offered. In fact, that is a compromise on my part since I'd already told you I would pay you nothing.

You, of course, are certainly entitled to litigate this matter. When you do, you can expect me to counter with a charge of malpractice. It is my belief that you violated our contract by exhibiting some very strange behavior in this case which, incidentally, needs to be examined in court. As you know,

your behavior has troubled me for a long time and we've discussed it. Let me show you the latest complaint of many.

We had agreed between us that the Goodwin section of the brief was not to be touched. Then, at the very last minute, I spotted that you had cut out a vital statement. Your excuse was that you had run short of space and had to cut there. At my insistance, you restored the statement. Later, after the brief had been forwarded to the court and you'd given me a copy of it, I discovered that you had added something to the text that changed the meaning of it. Lines 6 and 7 on page 18 read: "His statement can not be true since Dr. Goodwin did not meet with the plaintiff until, etc." The WITH was not in your earlier draft which I have. Why was it placed there without my knowledge at the last minuet? Why were words being inserted during a cutting operation when you claimed to lack space? I'm supposed to be able to trust my lawyer, right?

There is one thing that I feel very good about in all of this. I hold a tremendous advantage here that I contiue to hold in the EEO case--I can tell the truth. No matter how much other people may attempt to twist the facts, my ability to tell the truth in the end will pay off.

Sincerely,

S/

William FitzGerald, Ph.D.

P.S. I hope to have a client like me when I finish law school. I expect to be an advocate for my clients and they will know instictively that they can trust me.

APPENDIX J

The Court Reporter's Reluctance

To Collect on Her Alleged Bill.

LAW OFFICES
BROMBERG & ROSENTHAL
50 W. Montgomery Avenue
Suite 260
Rockville, Maryland 20850
(301) 251-6200

May 13, 1988

Dr. William A. FitzGerald

19617 Ridge Heights Drive

Gaithersburg, MD 20879

RE: Fitzgerald v. Bowen

Dear Fitz:

Enclosed please find a copy of a letter I received from Derenberger Reporting Co. regarding the outstanding balance due on the depositions conducted in November, 1987. As you know, pursuant to our agreement, you remain responsible for these costs. I have since sent a check to Derenberger in the sum of $485.75. Please send me a check for $485.75 as repayment for the amounts that I have spent on your behalf.

If you have any questions, please call.

Very truly yours,

s/

Barry J. Rosenthal

19617 Ridge Heights Drive

Gaithersburg, Maryland 20879

June 1, 1988

Ms. Patricia Pfeiffer

Derenberger Reporting Co., Inc.

7900 Wisconsin Avenue--Suite 400

Bethesda, Maryland 20814

Dear Ms. Pfeiffer:

Thank you for your letter of May 20. It does not really explain why, if the service was rendered on November 17, 1987, I received my first bill on February 2, 1988. Also, I have stated repeatedly to Mrs. Judith Derenberger and to Barry Rosenthal, Esq. that it is important to me that Mrs. Judith Derenberger herself sign such a letter.

Frankly, I do not undertand what the difficulty is here. So far, everybody but Mrs. Derenberger has written on her behalf. I first asked her to respond to two simple questions

way back in February; it is now June. She could have answered in February and settle the matter accordingly. Instead, we have gone through this baffling and torturous process.

Although your letter does not explain the time lapse, if Mrs Judith Derenberger would be kind enough to write the same letter you did and sign it without changing paragraphs 2, 3, and 4; I will accept it from her. I am ready and willing to pay this bill under those circumstances.

Sincerely

s/

William FitzGerald, Ph.D.

19617 Ridge Heights Drive

Gaithersburg, Maryland 20879

September 2, 1988

Ms. Judith Derenberger

Derenberger Reporting Co., Inc.

7900 Wisconsin Avenue, Suite 400

Bethesda, Maryland 20814

Dear Ms. Derenberger:

You have sent me a copy of a letter written to me by Ms. Patricia H. Pfeiffer, your office manager, in which she makes the statement concerning Mr. Rostenthal that I requested of you. But at the very bottom of this copy you name appears written with a felt-tipped pen.

As I'm sure you know from the Clifford Irving vs Howard Hughes Court case, signatures made with felt-tipped pens are of dubious legality in the courts since they remove identifying characteristics. Hand-writing experts can not establish authenticity under such circumstances. You have never used a

felt-tipped pen on any of the other documents you sent me so why do you start now?

In addition to the above, Ms. Pfeiffer's letter was written on May 20th and contained no other signature at that time. If you affixed your name to her letter subsequently, you must have done so sometime around August 30, 1988. Why then isn't your signature dated? This, indeed, is a strange way of doing business.

Ms. Derenberger, the game must end. Either you address to me a normal business letter on your letterhead, properly dated and signed by you with a ball point pen, verifying the information concerning Mr. Rosenthal exactly as Ms. Pfeiffer stated it in her second paragraph, or I will refuse to pay this bill. My deadline is September 9th. If you letter is not postmarked by that date, I'm afraid it will be too late. I regret being forced into an authoritarian posture but I have been trying to get you to verify this simple statement without tricks since February.

Sincerely,

s/

William FitzGerald, Ph.D.